SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM—1975

No. 75-1131

SAMUEL CHANEYFIELD,

Petitioner,

v.

THE CITY OF NEW YORK and
MATHEWS & CHASE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion Below

Opinion of the United States Court of Appeals dated November 14, 1975, Docket No. 75-7183 is not reported.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254 (1).

HROUGH

Questions Presented

(1) Does the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C., Section 721 et seq. create a private civil right of action against the owner or operator of a mine or tunnel, for violation of the Act?

(2) Is a private right of action for workers in a tunnel or mine implied inasmuch as the Federal Mine Safety Act was enacted for the "protection of workers in mines"?

(3) Is a tunnel in New York City which is dug out of solid rock hundreds of feet below the surface, with an underground railroad whose cars, loaded with rock blasted from the tunnel and known as "Manhattan Schist" are pulled by a Diesel locomotive to a shaft where a mine hoist raises the rock to the surface and from whence it is sold and carried in interstate commerce to the State of New Jersey where said rock is used in the construction of a large sport complex, a mine within the meaning of the Act?

(4) Should the Court below have permitted the Petitioner to process his claim on remand under the Federal Metal and Non-Metallic Safety Act jointly with the Federal Employers Liability Act, 45 U.S.C., Section 51 by reason of the fact that the underground railroad was a component part of the transportation of the "Manhattan Schist" in interstate commerce from New York to New Jersey?

Statutes Involved

Pertinent provisions of the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C., Section 731, et seq. and more particularly, Sections 721, 722, 738, as follows:

§ 721. Definitions

For the purposes of this chapter.

(a) The term "commerce" means trade, traffic, commerce, transportation, or communication between any State, the Commonwealth of Puerto Rico, the District of Columbia, or any territory or possession of the United States, and any other place outside the respective boundaries thereof, or wholly within the District of Columbia, or any territory or possession of the United States, or between points in the same State, if passing through any point outside the boundaries thereof.

(b) The term "mine" means (1) an area of land from which minerals other than coal or lignite are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (2) private ways and roads appurtenant to such area, and (3) land, excavations, underground passageways, and workings, structures, facilities, equipment, machines, tools, or other property, on the surface or underground, used in the work of extracting such minerals other than coal or lignite from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in the milling of such minerals, except that with respect to protection against radiation hazards such term shall not include property used in the milling of source material as defined in the Atomic Energy Act of 1954, as amended.

(c) The term "operator" means the person, partnership, association or corporation, or subsidiary of a corporation operating a mine, and owning the right to do so, and includes any agent thereof

charged with responsibility for the operation of such mine.

(d) The term "Secretary" means the Secretary of the Interior or his duly authorized representative.

(e) The term "Board" means the Federal Metal and Nonmetallic Mine Safety Board of Review created by section 729 of this title.

Pub.L. 89-577, § 2, Sept. 16, 1966, 80 Stat. 772.

HISTORICAL NOTE

References in Text. The Atomic Energy Act of 1954, as amended, referred to in subsec. (b), is classified to chapter 23 of Title 42. The Public Health and Welfare.

Effective Date. Section 22 of Pub.L. 89-577, provided that: "This Act [this chapter] shall become effective on the date of its enactment [Sept. 16, 1966], except that sections 8 and 9 [sections 727 and 728 of this title], and subsection (b) and paragraph (1) of subsection (a) of section 14 [section 733 of this title] shall become effective one year after the date of publication of notice in the Federal Register of the designation of mandatory standards as provided for in section 6(b) of this Act [section 725(b) of this title]."

Short Title. Section 1 of Pub.L. 89-577 provided: "That this Act [enacting this chapter] may be cited as the 'Federal Metal and Nonmetallic Mine Safety Act'."

Legislative History. For legislative history and purpose of Pub.L. 89-577, see 1966 U.S.Code Cong. and Adm.News, p. 2846.

§ 722. Mines subject to chapter; declination of jurisdiction

(a) Each mine the products of which regularly enter commerce, or the operations of which affect commerce, shall be subject to this chapter.

(b) The Secretary may, by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction under this chapter over any class or category of mines where, in the opinion of the Secretary, the effect of the operations of such mines on commerce is not sufficiently substantial to warrant the exercise of jurisdiction under this chapter, and the record of injuries and accidents in such class or category of mines warrants such a declination of jurisdiction. Pub.L. 89-577, § 3, Sept. 16, 1966, 80 Stat. 773.

HISTORICAL NOTE

References in Text. The Administrative Procedure Act, referred to in subsec. (b), is classified to section 551 et seq. of Title 5, Government Organization and Employees.

Legislative History. For legislative history and purpose of Pub.L. 89-577, see 1966 U.S.Code Cong. and Adm.News, p. 2846.

§ 738. Effect on State laws

(a) No State or territorial law in effect upon the effective date of this chapter or which may become effective thereafter, shall be superseded by any provision of this chapter, except insofar as such State or territorial law is in conflict with this chapter, or with orders issued pursuant to this chapter.

(b) Provisions in any State or territorial law in effect upon the effective date of this chapter, or which may become effective thereafter, which provide for greater safety of persons in a mine as defined in this chapter, than do provisions of this chapter, which relate to the same phase of such operations, shall not be construed or held to be in conflict with this chapter. Provisions in any State or territorial law in effect upon the effective date of this chapter, or which may become effective thereafter, which provide for the safety of persons in a mine as defined in this chapter concerning which no provision is contained in this chapter, shall not be construed or held to be superseded by this chapter.

(c) Nothing in this chapter shall be construed or held to supersede or in any manner affect the workmen's compensation laws of any State or territory, or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under State or territorial laws in respect of injuries, occupational or other diseases, or death of employees arising out of, or in the course of, employment.

Pub.L. 89-577, § 19, Sept. 16, 1966, 80 Stat. 784.

HISTORICAL NOTE

References in Text. Effective date of this chapter, referred to in subsec. (b), as Sept. 16, 1966, except that effective date of sections 727, 728, and 733(a), (1), (b), of this title as effective one year after date of publication of notice in Federal Register of designation of mandatory standards as provided for in section 725(b) of this title, see section

22 of Pub.L. 89-577, set out as Effective date note under section 721 of this title.

Legislative History. For legislative history and purpose of Pub.L. 89-577, see 1966 U.S.Code Cong. and Adm.News, p. 2846.

The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801, et seq.

The Federal Employers Liability Act, 45 U.S.C., §51.

U.S.Code Congressional and Administrative News, Vol. 2, Page 2846 (89th Congress, Second Session 1966).

Statement

On September 13, 1971 the Petitioner was employed as an engineer on a Diesel locomotive used to pull muck cars in a tunnel under New York City's West Side. The muck cars were used to carry rock known as "Manhattan Schist" blasted from the tunnel. The Diesel locomotive pulled the muck cars to a shaft in the tunnel located on West 79th Street and Riverside Drive, Borough of Manhattan, City of New York where the Manhattan Schist was hoisted by a conventional mine hoist to trucks which transported the rock to New Jersey where it was used as fill and foundation for a large sport complex being erected there.

While the ten car train was en route to the mine shaft, nine loaded cars became uncoupled from the locomotive and one car attached thereto, and proceeded on its way without knowledge of the Petitioner. When the free-riding loaded nine cars came to an incline turning downward, the uncoupled cars increased their speed until they crashed into the rear of the one car attached to the locomotive,

projecting the Petitioner out of the cab and under the wheels of a car which remained attached to the locomotive, resulting in severe and permanent injuries to the Petitioner.

The Court of Appeals in an opinion by Judge Oakes held that Congress in enacting the Federal Metal and Non-Metallic Mine Safety Act (Sect. 738(c)) did not afford a private right of action in favor of a workman injured in the tunnel in violation of the Act. Although the District Court (Richard Owen, J.) dismissed the action for lack of Federal jurisdiction without permitting the amendment to include the Federal Employers Liability Act, 45 U.S.C., Section 51, the Court of Appeals in its decision below held that such an inclusion of Federal Employers Liability Act would not have changed the result for neither the Respondents The City of New York or Mathews & Chase, its Consulting Engineers, can be considered to have held themselves out to the public as carriers of the "Manhattan Schist" on the underground railroad involved.

The Federal questions sought to be reviewed were raised by a motion to dismiss the action on the ground that the Court lacked the jurisdiction and the cause of action was not stated inasmuch as the alleged claim did not arise out of the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C., Section 731, et seq.

Judge Richard Owen in the United States District Court, Southern District of New York in a Memorandum Decision and Order granted the Motion to dismiss on the ground that the operation in which the Petitioner was working was not a mine within the Federal Metal and Non-Metallic Mine Safety Act; that said Act does not provide for a private right of action by one injured and that the Respondent Mathews & Chase are not mine op-

erators within the Act and that there is no Federal jurisdiction.

On appeal, the United States Court of Appeals for the Second Circuit, per Oakes, J. in an opinion dated November 14, 1975 held that the Federal Metal and Non-Metallic Mine Safety Act did not provide for private remedies and did not create jurisdiction in the Federal District Court for the enforcement of private remedies. The Court of Appeals did not reach the question as to whether the Respondent The City of New York operated the project railroad "as a means of carrying for the public". The Court of Appeals further did not pass upon the question as to whether the railroad's shipment are "in commerce".

REASONS RELIED ON FOR GRANTING WRIT

POINT I

The desperate need of safety measures enacted by the Congress for the protection of workers in underground operations will be wholly negated if a private right of action under the Act is denied.

With the discovery and development of new sources of energy and the need to extract metallic and non-metallic products underground and their transportation to the centers of usage will require more and more use of mine and tunnel operations. The most pressing problem in search of an answer is that of environmental and pollution control. Apart from the continuing need for improved stable business conditions, the chief problem concerning the nation as it enters on its Bicentennial year is the need for development of new products and the

transportation of wastes which have damaged the beauty of the country and the health of its inhabitants.

In a parallel field, namely, coal mining, Congress has set the standards of safety to insure the continued life and health of the miner when it enacted the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801, et seq. In all other areas other than coal and lignite mines, Congress sought a parallel measure of safety for the worker in the remaining underground operations. The title of the Federal Metal and Non-Metallic Mine Safety Act on its face indicates that Congress was very much concerned in maintaining high standards of safety. Apart from these two Federal statutes aforesaid there are no other Federal Acts that look towards the safety of workers underground. It is to insure the implementation of the intent of Congress to give the underground worker these measures of safety that this Court should hold that Congress intended to give the underground worker a private right of action with which he would assist in the enforcement of the Code of Rules which Congress intended.

Section 738(c) of the Federal Metal and Non-Metallic Mine Safety Act affords the underground worker his rights under the statutory Workmen's Compensation Laws as well as under Common Law.

POINT II

Absent a Federal yardstick of safety for underground operations, the Country will be faced with a lack of uniform control in discovering and transporting those elements of substance and energy needed as the Country commences the Third Century of its existence.

Every phase and area of the nation has felt the impact caused by the necessary import of oil from the Mid East. The utilities that are generating the electric current so desperately needed by the American economy to continue on its course of economic and national defense will be side-tracked if these new sources of energy are not found and transported to the centers of commerce.

The long sought and tedious development of the Alaskan pipe lines is giving the Country some measure of confidence. This, however, will require the construction of tunnels and pipelines underground with which to carry safely and swiftly the precious oil so greatly needed by American industry. To a limited extent, such underground construction operations of tunnels and mines were seen in the development of the natural gas lines from their sources in Oklahoma and other States to the cities where the same is utilized by the citizenry of the great metropolises.

The deposits of oil in continental United States are claimed by geologists to be of a limited amount and hence, they, as well as the national oil companies are urging the Government to permit the usage of coal and the development of nuclear power plants. To get at these original sources of energy, mines and tunnels of all kinds will have to be excavated underground. Finally, the Government will have to take broad and varied measures to

insure that the beauty of the countryside and the health of its citizens are not impaired by pollution. To do this, the Government has underwritten a huge underground tunnel in which the Petitioner was injured and which is known as the North River Water Pollution Control Project to serve as part of the City's sewer system. A short distance from this tunnel is located a large engineering project known as the North River Pollution Plant which upon completion will serve to screen and control the wastes of a goodly portion of the City of New York that has polluted the North and Hudson Rivers in the City of New York as well as other waterways throughout the Country.

Congress having acted to locate and transport new sources of energy could, by the same token, have enacted legislation to control environmental damages and should not be obstructed in its goals in having the workmen who are at the bottom of the ladder working in underground facilities injured in life and limb with no protective measures for himself and his next of kin.

It is incredible to assume that Congress, through its various committees, having become knowledgeable of all of these vast undertakings which will influence the future of our nation as we commence the third century, as much as the industrial revolution influenced our nation during the course of its first one-hundred years, has not provided suitable legislation to protect the workmen in underground facilities and for their next of kin in case of death.

The language of the Senate Committee reports, particularly Senate Report 1296 is sufficient to justify that the Federal Metal and Non-Metallic Mine Safety Act offers an underground worker a private cause of action for personal injuries suffered or to his next of kin for wrongful death.

The legislative history in Senate Report No. 1296 deals with the actions of these Congressional Committees covering the period from June 23 to August 31, 1966 and contained on Page 2851, the following language is used:

> "Scope of Coverage" and reads * * * "The proposed—Act—will cover every mine the products of which regularly enter commerce or the operation of which affect commerce * * * authorizing the Secretary (of Interior) to decline to assert jurisdiction under this Act over mines, when in his opinion, the effect of the operations of such mines in commerce is not sufficiently substantial to warrant the exercise of jurisdiction or the exercise of jurisdiction would impair the effective overall realization of the objectives of the Act * * *."

Up to the time of the accident, in the case at bar, the Secretary of the Interior has not declined jurisdiction and therefore Federal Interior Department jurisdiction existed.

Hence, at this phase, the Petitioner seeks only to demonstrate to this Honorable Court the compelling need to grant the Writ of Certiorari and to assure the most precious product of the underground operation, namely, the worker or miner that his representatives assembled in the nation's capital have made all efforts to insure that his inalienable right to life and to limb is not swept down the drain of pollution or in the cave-in of a mine or tunnel. This is for a cause he has given and will give the major part of his adult life.

Causes will multiply and uncertainty will increase unless this Court makes known to the Petitioner and others like him of their rights in working in underground facilities. A reading of the Committee Reports in the Con-

gress will demonstrate that the only factor in which it was extremely interested was that of "safety". This is true whether the underground facility was an excavation for precious stones or minerals in the area of the Comstock Lode in Nevada, the salt mines in Syracuse, the limestone mines in Indiana, the lead mines in Missouri and the iron mines in Colorado, or whether the underground facility was to be used for the carrying of water such as a large underground viaduct blasted out of solid rock 900 feet below ground connecting the reservoirs in Westchester County by an underground tunnel or mine now in construction going through the Counties of the Bronx, New York, under the East River into Queens in the City of New York. It may be noted that the water viaduct has chambers 65 feet high, 45 feet wide dug out of solid rock 900 feet underground. Is it any less a mine because the rock excavated is "Manhattan Schist" which is sold in interstate commerce in the State of New Jersey rather than a metal or stone, precious or non-precious, if the product excavated is secondary to the general purposes of the underground operations? Is a fractured leg any more or less painful or injurious if it occurs in an underground excavation for lead, gold, silver or limestone rather than "Manhattan Schist?" Congress was not interested in the product as it was in safety in the underground operation. And how many mines are excavated out of solid rock 900 feet underground? The overall intent of Congress was to include every form of underground excavation, other than coal, lignite and liquids for which other provisions were made.

In the instant case the tunnel was part of a large sewer pollution control plant running for many miles, the products of which, namely, "Manhattan Schist" was sold and transported in interstate commerce into the State of New Jersey. A "mine is still a mine" if after hundreds of

feet of excavation for silver, the underground operations turn out to be a dud with no silver discovered and mined. In other words, the product excavated is not controlling as to whether or not the underground excavation is a "mine" and this is also true whether the underground excavation occurs in the iron mines of Colorado or in a water viaduct blasted out of solid rock 900 feet underground or in the case at bar, namely, a large tunnel or mine in which the Petitioner was injured. Confusion is easy and a "sewer tunnel" may be misleading but at the moment when the Petitioner was severely injured, it was an underground excavation meeting the definitions of a mine as set forth in Sections 721 and 722 of the Federal Metal and Non-Metallic Mine Safety Act.

Accordingly, Congress wrote the Federal Metal and Non-Metallic Mine Safety Act for all types of underground excavations including sand and gravel whether the the product is metal or non-metallic as long as the same was sold or distributed in interstate commerce or in some way affecting commerce. The tunnel in question had all of these attributes and conformed precisely with all of the provisions of the Federal and Non-Metallic Mine Safety Act as reported in U.S. Code Congressional and Administrative News, Vol. 2 Page 2846 (89th Congress, Second Session 1966). In fact, Senator Javits, one of the sponsors of the Act at Page 2871 said:

> "Unlike the Coal Mine Safety Act, this bill will cover a great diversity of mines, with an even greater diversity of dangers and I believe it unwise to attempt to write a comprehensive 'laundry list' and risk leaving out some important danger, which through inadvertence, might have been overlooked by the committee."

At the present time the Court of Appeals for the Second Circuit is holding in abeyance a second appeal based upon the Federal Metal and Non-Metallic Mine Safety Act, entitled

Bernard Rush

v.

The City of New York

United States Court of Appeals
Second Circuit Docket No. 75-7562.

This case involves the water viaduct. Consideration of the appeal in the Rush case has been deferred by the Court of Appeals for the Second Circuit pending disposition on the Petition for the granting of the Writ of Certiorari on the case at bar, pursuant to a stipulation of counsel approved by the Court.

CONCLUSION

The Court of Appeals overlooked the intent of Congress to insure safety in holding that the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C., Section 731 et seq. did not grant a private civil right of action in favor of the Petitioner for injuries suffered in an underground excavation, running many miles, hundreds of feet below the surface out of solid rock and which had all of the attributes and dangers of a conventional mine and whose products were sold and transported in interstate commerce from the State of New York to the State of New Jersey; the Court of Appeals failed in its duty to rule on the "rather troublesome" question as to whether the underground excavation was a mine within the purview of 30 U.S.C. Section 721 (b) and whether the railroad's shipments are "in commerce". The failure of the

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Court below to pass on these questions leaves the Petitioner and thousands of workers like him in limbo as to his and their rights under the Act; no other Federal tribunal having passed on this subject throughout the country should prompt this Honorable Court to grant certiorari for the effect of the Federal Metal and Non-Metallic Mine Safety Act on the many workers underground in the days ahead as the nation gets underway in the discovery and production of sources for energy and control of environmental pollution will be great indeed.

Respectfully submitted,

WILLIAM J. CORCORAN
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11 Park Place
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Memorandum Decision and Order by Owen, D.J.

Since the operation in which plaintiff was working was not a mine within the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C. §721 et seq.; since that act does not provide for a private right of action by one injured; and since Mathews & Chase are not mine operators within the act, there is no Federal jurisdiction and the motion to dismiss is granted.*

So Ordered

s/ RICHARD OWEN
U.S.D.J.

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* On my own motion, pursuant to Rule 12 (b) (3) F.R.C.P. the action as dismissed as to the City of New York as well as on the ground that there is no subject matter jurisdiction.

Motion for Reargument; Supporting Affidavit of William J. Corcoran, Esq., and Memorandum of Judge Owen Denying Motion for Reargument

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIR:

Please Take Notice, that upon the annexed affidavit of William J. Corcoran, duly sworn to the 11th day of March, 1975, the Memorandum of Law submitted in connection therewith, and upon all of the proceedings heretofore had herein, on the 26th day of March, 1975, at 10:00 o'clock in the forenoon of that day, the undersigned attorneys for the plaintiff, Samuel Chaneyfield, will move before Judge Richard Owen sitting in Chambers at the United States District Court for the Southern District of New York, Foley Square, New York, New York, for the following relief:

1. An Order granting this motion for reargument, pursuant to Rule 9(m) of the General Rules of this Court.*

2. Upon the granting of the motion for reargument that the decision of this Court, rendered on February 21, 1975, dismissing the cause of action as against the defendants, Mathews & Chase, and upon the Court's own motion, dismissing the cause of action against the defendant The City of New York upon the grounds that the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C. §721 *et seq.* does not apply to the operations in which the plaintiff was working; and further, that such Act does not provide for a private right of action

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* The Court, per Peter Block, extended time to 3/12/75.

by one injured; and further, on the ground that the defendant, Mathews & Chase, are not mine operations within the meaning of the Act; and that there is no Federal jurisdiction, be recalled, and that thereupon the said motion of the defendant, Mathews & Chase, and the Court's own motion to dismiss the complaint, be denied.

Dated: New York, New York
March 11, 1975

Yours, etc.

CORCORAN AND BRADY
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Affidavit of William J. Corcoran in Support of Motion for Reargument

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM J. CORCORAN, being duly sworn, deposes and says:

1. I am a member of the firm of Corcoran and Brady, attorneys for the plaintiff in the above-entitled action, and am familiar with the facts herein.

2. An application for reargument of the motion heard before this Court on the 21st day of February, 1975 is sought on the ground that this Honorable Court has misconstrued the meaning and intent of the Congress in enacting the Federal Metal and Non-Metallic Mine Safety Act 30 U.S.C. §721 *et seq.* Parenthetically, the Court misconstrued the purposes for which Congress enacted the Act, aforesaid, by confusing the ultimate object of the underground work in progress and believing the underground facility to be an "intercepting sewer" rather than a "mine". This misconception is readily understandable when one conceives of a mine as being an underground facility from which is extracted a precious or non-precious metal or mineral, and nothing more.

3. In the event the Court adheres to its original decision that the Federal Metal and Non-Metallic Mine Safety Act is not applicable to the within case, then, and in that event, the attorneys for the plaintiff begs leave

of the Court to amend the complaint so as to base jurisdiction on the Federal Employees Liability Act, 45 U.S.C., Section 51 *et seq.*

4. Such other and further relief as to this Court may seem just and proper.

(Sworn to by William J. Corcoran, March 11, 1975.)

To:

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Southern District of New York
Foley Square
New York, New York

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22 East 40th Street
New York, New York 10016

J. Robert Morris, Esq.
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New York, New York 10038

Memorandum of Judge Owen

The motion for reargument is denied.

So Ordered

3/21/75

Filed 3/26/75

/s/ Richard Owen
U. S. D. J.

Opinion of the United States Court of Appeals for the Second Circuit, Decided November 14, 1975, Docket No. 75-7183

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 62—September Term, 1975.

(Argued October 3, 1975 Decided November 14, 1975.)

DOCKET No. 75-7183

SAMUEL CHANEYFIELD,

Appellant,

v.

THE CITY OF NEW YORK and MATHEWS & CHASE,

Appellees.

Before:

WATERMAN, OAKES and MESKILL,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Richard Owen, *Judge*, dismissing a complaint under the Federal Metallic and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 *et seq.*

Opinion of the United States Court of Appeals for the Second Circuit, Decided November 14, 1975, Docket No. 75-7183

Judgment affirmed.

WILLIAM J. CORCORAN, Corcoran & Brady, New York, N.Y., *for Appellant.*

ROY E. POMERANTZ, New York, N.Y. (Kenneth J. Balkan and Kroll, Edelman, Elser & Wilson, New York, N.Y., on the brief), *for Appellees.*

OAKES, *Circuit Judge:*

This appeal is from the dismissal of a complaint for personal injuries under the Federal Metallic and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 *et seq.* (hereafter the "Mine Safety Act"). Judge Richard Owen, of the United States District Court for the Southern District of New York, concluded that the Mine Safety Act did not apply under the facts and, as no other federal claim was alleged, he dismissed the complaint for lack of subject matter jurisdiction. We agree that the Mine Safety Act, enacted in 1966, confers no private right of action, and, although appellant seeks leave to amend his complaint, we affirm the dismissal of this action.

On September 13, 1971, appellant was the engineer of a Diesel locomotive being used to pull "muck cars" in a tunnel under New York City's West Side. The muck cars were used to remove rock debris, known as "Manhattan schist," which was excavated in the construction of the tunnel. This debris was removed from the tunnel at West 79th Street and Riverside Drive. It was then apparently sold and removed to New Jersey, where it was to be used as fill or foundation at a stadium project.

The tunnel was being dug as a portion of the North River Water Pollution Control Project, and is to serve

as part of the City's sewer system. Appellee City owns the tunnel and contracted with appellant's employer, who is not a party to this suit, for its excavation. Appellee Mathews & Chase is the City's consulting engineer on the project.

Appellant's affidavit alleges that he was injured when nine of the ten loaded muck cars his locomotive was pulling became uncoupled. The detached cars at first rolled slowly after the locomotive as it pulled away. But then, as the incline turned downward, the uncouped cars rolled faster and faster until they crashed against the rear of the one remaining car. This jolt caused the appellant to fall from the locomotive, resulting in severe injuries to his left arm.

It is appellant's contention that the tunnel project is a "mine" within the meaning of the Mine Safety Act, 30 U.S.C. §§ 721(b), 722(a). He argues that the appellee City as owner of the "mine" and Mathews & Chase as its supervising agent are liable to him for any injuries he sustained due to unsafe mine conditions.

The Minety Safety Act was, as appellant correctly asserts, doubtless enacted for the purpose of extending federal supervision of mine safety to mines of all type and character (other than coal and lignite mines which are regulated by a different statute, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.*). As such the Mine Safety Act requires the Secretary of Interior to designate mandatory safety standards after public hearing, 30 U.S.C. § 725; it authorizes the Secretary to order the closing of dangerous mines, or areas thereof, or of those in which there has been a failure to abate violations of the mandatory safety standards, 30 U.S.C.

§§ 727-28; it establishes a "Safety Board to Review" to review the Secretary's closing orders, 30 U.S.C. §§ 729-30; and it establishes judicial review of the Safety Board's orders, 30 U.S.C. § 731. The Act further provides that the Secretary may seek injunctions to enforce orders made under the Act, 30 U.S.C. § 733(a), and that criminal penalties may be levied against a mine operator for refusal to obey valid orders where the failure to comply could result in death or serious bodily harm, 30 U.S.C. § 733(b). The statute, however, explicitly does not "enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees . . . in respect of injuries . . . arising out of, or in the course of, employment." 30 U.S.C. § 738(c).[1]

Neither anything in the Mine Safety Act nor any authority referred to us by counsel or discovered by us upon research purports to suggest that the Act creates a private right of action by an injured employee against the mine operator, or the operator's agents, for violation of the Act. Congress knows full well how to create a private civil right of action to protect employees from dangerous working conditions. Two obvious examples are the Fed-

[1] 30 U.S.C. § 738(c) provides in full as follows:

> Nothing in this chapter shall be construed or held to supersede or in any manner affect the workmen's compensation laws of any State or territory, or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under State or territorial laws in respect of injuries, occupational or other diseases, or death of employees arising out of, or in the course of, employment.

eral Employers' Liability Act, 45 U.S.C. § 51, and the Jones Act, 46 U.S.C. § 688. The plain language chosen by Congress to effect its remedial purpose in those enactments suggests, by contrast to the absence of such expression in the Mine Safety Act, that the governmental purpose of insuring mine safety is to be achieved by government regulation, rather than by private civil actions.

It is true that in *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432-34 (1964), for example, the Supreme Court held in connection with Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), that private rights of action for investors could be implied since the statute was for the "protection of investors." Similarly, the Mine Safety Act is plainly aimed at the protection of miners. However, the implication of a direct private action under the Mine Safety Act cannot be supported by analogy to *Borak*. The Securities and Exchange Act specifically provided in Section 27, 15 U.S.C. § 78aa, a grant of jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created" under that Act. The Supreme Court relied on that general enforcement jurisdiction to infer a provision for private remedies under the Securities and Exchange Act in *Borak, supra*, 377 U.S. at 430-31. By contrast, the Mine Safety Act provides for no such general jurisdiction, and further specifically denies that it may be construed to "enlarge, diminish or affect" the rights and liabilities of private parties regarding employment-related injuries. 30 U.S.C. § 738(c).

Under the Mine Safety Act, the role of the courts does not go beyond review and enforcement of orders made under the Act by the Secretary of the Interior. *See* 30 U.S.C. §§ 731, 733. It is wholly through the instrument of

the Secretary's safety standards, inspections and compliance orders that the Act regulates the conditions of mines, with the view of accommodating both the interests of mine operators and mine workers. *See* 30 U.S.C. §§ 726, 729(c). In view of the purely regulatory nature of the Mine Safety Act scheme, we read the congressional segregation of the Act from private remedies in 30 U.S.C. § 738(c) at face value. We do not perceive the Act to have created jurisdiction in the federal district courts for the enforcement of private remedies as part of the arsenal for effectuation of regulations and orders made under the Act. This conclusion wholly comports with the legislative history of the Act as set forth in the Senate Report and the Conference Report, 1966 U.S. Code Cong. & Ad. News 2846, 2872 (individual views of Senator Javits), 2883. Appellant is, therefore, relegated to his state law claims[2] and we need not face here the rather troublesome question, somewhat lightly discussed by the court below, whether the operation in which appellant was working was indeed a "mine" under the broad definition of that term in the Mine Safety Act, 30 U.S.C. § 721(b).[3]

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[2] We gathered at argument that he has pursued his workmen's compensation claims against his own employer. The record also shows that he has a state action pending, apparently for products liability and negligence, against the coupling manufacturer, as well as Mathews & Chase and several defendants other than the City of New York. (Affidavit of Attorney William J. Corcoran in Opposition to Motion to Dismiss.)

[3] 30 U.S.C. § 721(b) provides simply that "[t]he term 'mine' means (1) an area of land from which minerals other than coal or lignite are extracted. . . ." 30 U.S.C. § 722(a) adds the additional requirement that, to be subject to the Act, the mine must be one "the products of which regularly enter commerce. . . ."

As an afterthough, appellant argues, for the first time in this court, that he should be permitted before final dismissal to amend his complaint to the same set of facts under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51. His ingenious, if rather farfetched, suggestion, primarily based on *Kach* v. *Monessen Southwestern Railway Co.*, 151 F.2d 400 (3d Cir. 1945) (wholly intrastate movement, if part of continuous movement which eventually crosses state border, can be "in commerce" within meaning of the term as used in FELA), is that because the Manhattan schist excavated in this project is transported in commerce from New York to New Jersey, and since he was injured in a railroad-type accident[4] in connection with the initial stage of such transportation, the owner of the "railroad" is "liable in damages" for the injury under the FELA, 45 U.S.C. § 51.

Granting that only appellant's complaint and not his action technically has been dismissed, the question is whether a remand is required here solely for the purpose of permitting an additional allegation of FELA jurisdiction. It is true that a motion to dismiss a complaint before trial should ordinarily be granted only with leave to amend. The action itself should be dismissed only after the time granted for amendment has expired. A number of cases, including our own *Klebanow* v. *New York Produce Exchange*, 344 F.2d 294, 299-300 (2d Cir. 1965), and *Neeff* v. *Emery Transportation Co.*, 284 F.2d

[4] We say railroad-type accident because, obviously, appellant alleges that he was employed as a "locomotive engineer" operating a "Diesel locomotive" used to push and pull "muck cars" on narrow guage (36-inch) "railroad tracks" in the tunnel at the time of the uncoupling accident.

432, 434-35 (2d Cir. 1960), say that for the trial court to refuse leave to amend at this stage of the pleadings is to abuse its discretion. *See* 3. J. Moore, Federal Practice ¶ 15.10, at 957 & n.2 (1974 ed.). But here neither Judge Owen's memorandum decision ordering dismissal of the complaint, entered on February 25, 1975, nor the judgment order from which appeal is taken provided for leave to amend. True, appellant could have and perhaps should have moved below for relief under Fed. R. Civ. P. 59(e) or 60(b), that is, to reopen the judgment to permit the amended pleading, rather than have taken his appeal. 3 J. Moore, *supra* ¶ 15.07[2], at 855; ¶ 15.10, at 959-60. Indeed there is authority, chiefly in the Ninth Circuit, for the proposition that appeal from grant of a motion to dismiss a *complaint* is premature, because the "final order" is the one which dismisses the action. *See* 2A J. Moore, *supra,* ¶ 12.14, at 2338-39; 9 J. Moore, *supra,* ¶ 110.13[1], at 152, *citing, e.g., Richardson* v. *United States,* 336 F.2d 265, 266 (9th Cir. 1964). *But see Stewart* v. *Lincoln-Douglas Hotel Corp.,* 208 F.2d 379, 381 (7th Cir. 1953) (where district court intended by its order dismissing complaint to terminate litigation and plaintiff by promptly taking appeal elected to stand on complaint, order was final and appealable).

We are inclined, however, to adopt the practical assumption that by not seeking relief below appellant intended that we treat the district court order as if the action had been dismissed. 9 J. Moore's *supra,* ¶ 110.13[1], at 153. As the Supreme Court has observed in a case involving a premature appeal, it is "too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided

on the basis of such mere technicalities." *Foman* v. *Davis*, 371 U.S. 178, 181 (1962) (technical defect in notice of appeal which did not prejudice appellee). In the interest of avoiding unduly technical constructions of the Federal Rules we will, therefore, treat the district court order as final. *See* 9 J. Moore, *supra*, ¶ 204.14. And in the spirit of the Rules we will examine the complaint to see whether it could be deemed if amended to state an FELA claim. If so we can remand to permit such amendment; if not we can affirm.

The FELA applies only to a "common carrier by railroad. . . ." 45 U.S.C. § 51. This means "one who operates a railroad as a means of carrying for the public. . . ." *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175, 187-88 (1920) (express company not common carrier). *See also Edwards* v. *Pacific Fruit Express Co.*, 390 U.S. 538, 540 (1968) (refrigerator car companies not common carriers). The question what is a "common carrier by railroad" is one which frequently causes difficulty where the use of railroad equipment is involved. *Compare McCrea* v. *Harris County Houston Ship Channel Navigation District*, 423 F.2d 605 (5th Cir.), *cert. denied*, 400 U.S. 927 (1970) (political subdivision operating terminal facilities maintaining railroad trackage at a bulk material handling plant and public grain elevator not a common carrier), *with Lone Star Steel Co.* v. *McGee*, 380 F.2d 640 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967), (steel company performing rail services for itself and others held a common carrier). But here neither the City of New York nor Mathews & Chase, its consulting engineers, can in any way be considered to have held themselves out to the public as carriers of the Manhattan schist on the under-

ground "railroad" here involved. Only one shipper was, and only one could have been, served by this "railroad," and that shipper was the project itself.

Construing appellant's complaint most favorably to his position, we cannot conclude that the City operates the project railroad "as a means of carrying for the public." We therefore need not concern ourselves with the argument that the "railroad's" shipments are "in commerce." *See Kach* v. *Monessen Southwestern Railway Co., supra,* 151 F.2d at 401.

Even had appellant been granted leave to amend his complaint below (as would have been the preferable form of order below) or had moved under Rules 59 and 60 for relief from the court's order (as would have been the preferable practice), the district court would have been compelled to dismiss this complaint and its underlying action. Accordingly we firm the judgment.

Judgment affirmed.

Judgment of the United States Court of Appeals for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of November, one thousand nine hundred and seventy-five.

Present:

HON. STERRY R. WATERMAN
HON. JAMES L. OAKES
HON. THOMAS J. MESKILL
Circuit Judges,

75-7183

SAMUEL CHANEYFIELD,

Plaintiff-Appellant

v.

THE CITY OF NEW YORK and MATHEW AND CHASE,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of New York.

Judgment of the United States Court of Appeals for the Second Circuit

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. Daniel Fusaro
Clerk

By Vincent A. (Illegible)
Chief Deputy Clerk

MAR 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1131

SAMUEL CHANEYFIELD,

Petitioner,

v.

THE CITY OF NEW YORK, and
MATHEWS & CHASE,

Respondents.

BRIEF OF RESPONDENT MATHEWS & CHASE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1131

SAMUEL CHANEYFIELD,

Petitioner,

v.

THE CITY OF NEW YORK, and
MATHEWS & CHASE,

Respondents.

BRIEF OF RESPONDENT MATHEWS & CHASE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

Opinion of the United States Court of Appeals dated November 14, 1975, Docket No. 75-7183 is reported at 525 F. 2d 1333 (1975).

Jurisdiction

The petitioner has invoked jurisdiction of this court under Title 28 U.S.C. Section 1254 (1).

Statutes Involved

The petitioner has set forth Sections 721, 722, and 738, of the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C., Section 731, *et seq.* In addition to such provisions, materially involved is Section 733 of the same act, which provides as follows:

§733. Penalties for violations; Civil and Criminal Liability

(a) Whenever the operator (1) violates or fails or refuses to comply with any order of withdrawal and debarment issued under Section 727 or Section 728 of this title, or (2) interferes with, hinders, or delays the Secretary, or his duly authorized representative, in carrying out his duties under this chapter, or (3) refuses to admit an authorized representative of the Secretary to any mine which is subject to this chapter, or (4) refuses to permit the inspection or investigation of any mine which is subject to this chapter, or an accident, injury or occupational disease occurring in or connected with such a mine, or (5) being subject to the provisions of Section 732 of this title, refuses to furnish any information or report requested by the Secretary, a civil action for preventative or temporary injunction, restraining order, or other order, may be instituted by the Secretary in the District Court of the United States for the District in which the mine in question is located or in which the mine operator has its principal office.

(b) Whoever violates or fails or refuses to comply with an order of withdrawal and debarment issued (1) under subsection (a) of Section 727 of this title or (2) under subsection (b) of Section 727 of this title if the failure to comply with an order of abatement has created a danger that could cause death or serious physical harm in such mine immediately or before the imminence of such danger can be eliminated, shall upon conviction thereof be punished for each such offense by a fine of not less than $100, or more than $3,000, or by imprisonment not to exceed sixty days, or both. In any instance in which such office is committed by a corporation, the officer or authorized representative of such corporation who knowingly permits such offense to be committed shall, upon conviction, be subject to the same fine or imprisonment, or both.

Questions Presented

(1) Should a Petition for a Writ of Certiorari be granted in the absence of a conflict in decisions by Federal Courts of Appeals and where a determination by such a Court has conformed with the usual and accepted course of judicial proceedings?

(2) Does the Federal Metal and Non-Metallic Mine Safety Act create a private right of action on behalf of an injured person against a consulting engineer retained to ascertain that a sewage project, during construction, conforms to plans, designs and specifications?

(3) Does the dismissal of the petitioner's cause of action under the Federal Metal and Non-Metallic Mine Safety Act leave the petitioner without a remedy, notwith-

standing the civil action which had been commenced by the petitioner against the respondent and other parties, in the Supreme Court of the State of New York, County of Bronx?

Statement of Facts

On September 13, 1971, the petitioner, an Operating Engineer, sustained injuries during the operation of a diesel locomotive used to pull muck cars in the North River Water Pollution Control Project, which was to serve as a part of the sewer system of the City of New York. The respondent Mathews & Chase was the consulting engineer retained by the respondent City of New York, the latter being the owner of the sewage system.

The petitioner has alleged that a coupler between two of the muck cars disengaged, causing the loose muck cars to strike the rear of the muck car attached to the locomotive in which the petitioner was standing.

Prior Proceedings

On August 7, 1974, an action was commenced by the petitioner in the Supreme Court of the State of New York, County of Bronx, against various defendants, inclusive of the respondent Mathews & Chase. In that action, the petitioner failed to include the City of New York as a party defendant, but asserted the liability of the respondent Mathews & Chase, as consulting engineer, deriving from its consulting contract with the City of New York with respect to the construction of the sewage system.

Subsequently, on September 4, 1974, the petitioner commenced an action in the United States District Court for the Southern District of New York, naming as defendants

the City of New York and Mathews & Chase, asserting an action for damages pursuant to the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C. Section 731, *et seq.*

Respondent Mathews & Chase moved to dismiss the complaint in the United States District Court on several grounds, including lack of jurisdiction and the absence of a valid cause of action against the respondent Mathews & Chase under the Federal Metal and Non-Metallic Mine Safety Act. A hearing was conducted and the relief sought by respondent Mathews & Chase was granted; the Court, on its own motion, dismissed the action against the respondent The City of New York. The memorandum decision and order of United States District Judge Richard Owen noted that (1) the sewage system in which the petitioner was working was not a "mine" within the meaning of the Federal Metal and Non-Metallic Mine Safety Act; (2) that said act did not provide for a private right of action; and (3) that Mathews & Chase was not an "operator" within the meaning of the act.

Following service of a Notice of Appeal from that decision, petitioner moved for re-argument, and requested leave to amend the complaint so as to state a cause of action under the Federal Employers' Liability Act, 45 U.S.C., Section 51, notwithstanding that such request was not contained in the opposition papers to the Notice of Motion to Dismiss. United States District Judge Richard Owen denied the motion for re-argument.

In a unanimous opinion at 525 F. 2d 1333 (1975) the United States Court of Appeals for the Second Circuit held that the Federal Metal and Non-Metallic Mine Safety Act did not confer a private right of action, affirming the dismissal of the action. It was also held that neither the respondents City of New York nor Mathews & Chase held themselves out to the public as rail carriers and there-

fore the Federal Employers' Liability Act was inapplicable. In a footnote, the Court further observed that a state action for negligence was pending against the respondent Mathews & Chase, as well as against several other defendants.

POINT I

A review on a Writ of Certiorari is within the sound judicial discretion of the Court and should be denied in the absence of a conflict in decisions and where the Court of Appeals has conformed with the accepted and usual course of judicial proceedings.

The petitioner has attempted to invoke the jurisdiction of this Court pursuant to Title 28 U.S.C. Section 1254 (1), contending that the United States Court of Appeals for the Second Circuit overlooked the intent of Congress when it promulgated the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C. Section 731 *et seq.* It is conceded that no other Federal Court has rendered a contrary determination.

The petitioner seeks judicial creation of a cause of action, though Congress has intentionally chosen to relegate the petitioner to available state law remedies.

It is apparent that review on Certiorari is conferred for the limited purposes of securing uniformity of decisions between those Courts in the various circuits and to determine issues of importance which it is in the public interest to have decided by this Honorable Court of last resort. Rule 19 of the Supreme Court Rules, 28 U.S.C. provides, in part:

> "Rule 19. Considerations governing review on Certiorari:
>
> (1) A review on Writ of Certiorari is not a matter of right but of sound judicial discretion, and

> will be granted only where there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> • • •
>
> (b) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of Federal law which has not been, but should be, settled by this Court; or has decided a Federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a Lower Court, as to call for an exercise of this Court's power of supervision.
> • • •"

Significant is the fact that a Writ of Certiorari is not a matter of right but of sound judicial discretion. This doctrine was enunciated in *Magnum Import Company* v. *Coty*, 262 U.S. 159, 163, 43 S. Ct. 531, 532, 67 L. Ed. 922, 924 (1923) wherein it was held:

> "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80% of those who petition for Certiorari do not appreciate these necessary limitations upon our issue of the Writ."

In *Layne & Bowler Corp.* v. *Western Well Works, Inc., et al.*, 261 U.S. 387, 393, 43 S. Ct. 422, 67 L. Ed. 712 (1923)

Chief Justice Taft speaking for a unanimous Court, pronounced:

> ". . . [I]t is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles, the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeals."

This basic and fundamental premise has been oft times recognized and applied by this Court prior to entertaining a review of a Lower Court Decision. *Rice* v. *Sioux City Park Cemetery, Iowa,* 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

It is emphasized that the case at bar does not involve a conflict in the Courts of Appeals and as hereinafter indicated, an important question of Federal law is not presented inasmuch as the legislative provisions of the Federal Metal and Non-Metallic Mine Safety Act, *supra* are clear in intent and the petitioner is not without a remedy.

POINT II

The United States Court of Appeals for the Second Circuit properly affirmed the dismissal by the United States District Court on the basis that the Federal Metal and Non-Metallic Mine Safety Act does not provide for a private right of action.

Respondent Mathews & Chase is cognizant of the need for safety which has been stressed at length in the petition for Writ of Certiorari before this Court. Nevertheless, although safety is of great public concern and interest, that criterion alone is not determinative of the issues here presented.

The Federal Metal and Non-Metallic Mine Safety Act, *supra* was, of course, enacted to afford the United States Government authority and jurisdiction to promote safety in the mines which fall within the Act. The Act empowers the Secretary of the Interior to conduct investigations of mines in order to obtain information relating to health and safety conditions and to develop, promulgate and enforce health and safety standards. 1966 U.S. Code Cong. and A.D.M. News, P. 2846. The Act further provides, pursuant to Section 727, that the Secretary of the Interior, or an authorized representative, may issue an order requiring the operator of a mine to cause all persons, except those specified, to be withdrawn and barred from entering a mine in a situation of danger. In the event that a violation of one of the mandatory standards promulgated by the Secretary of the Interior is not corrected, then the Secretary or an authorized representative is empowered to make an order barring all persons from the mine.

It is noted that Section 733 of the Federal Metal and Non-Metallic Mine Safety Act, *supra* is the only section which relates to penalties. That Congress had the authority to create a private civil cause of action is beyond dispute. *See, e.g.* Federal Employers' Liability Act, 45 U.S.C. Section 51; Jones Act, 46 U.S.C. Section 688. That it specifically did not create such a private cause of action by reason of a violation of the provisions of the Federal Metal and Non-Metallic Mine Safety Act is also beyond dispute. Nothing in the Act, expressly or by implication, grants to any injured miner a new cause of action beyond those elsewhere found at law. For this reason, no cause of action at law exists in favor of the petitioner pursuant to the Federal Metal and Non-Metallic Mine Safety Act ***supra.***

POINT III

The Court should not usurp the constitutional powers of Congress and judicially create a cause of action which legislatively does not exist.

It is fundamental and hallowed principle of constitutional law that the Courts will neither interfere with nor encroach upon the legislative prerogative of Congress, which alone has the power to promulgate, modify and repeal laws. In like manner, the judiciary has long adopted the practice of not trespassing upon the domain of Congress by judicial abridgment, modification, enlargement or repeal of legislative enactments. *McCray* v. *United States,* 195 U.S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1904). The Supreme Court, in reviewing the effect of the Federal Soldiers' and Sailors' Civil Relief Act upon a foreclosure, stated, in *Ebert* v. *Poston,* 266 U.S. 548, 554, 45 S. Ct. 188, 69 L. Ed. 435 (1925):

> "The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the Legislature therein expressed. A casus omissus does not justify judicial legislation."

Again, with respect to a review of the Bankrupt Act of 1898, it was noted:

> "It is the province of the Court to enforce not to make, the laws, and, if the law works inequitably, the redress, if any, must be had from Congress." *New Jersey* v. *Anderson,* 203 U.S. 483, 490, 27 S. Ct. 137, 51 L. Ed. 284 (1906).

See *Blount* v. *Rizzi,* 400 U.S. 410, 91 S. Ct. 423, 27 L. Ed. 2d 498 (1971); *Schnell* v. *Peter Eckrich & Sons, Inc.,* 365 U.S. 260, 81 S. Ct. 557, 5 L. Ed. 2d 546 (1961); *Thornley* v.

United States, 113 U.S. 310, 5 S. Ct. 491, 28 L. Ed. 999 (1885).

Although the Courts may construe statutes, it is held that, in keeping with the general rule against judicial legislation, they may not seek to further define the intent of Congress by interpolating words which the legislature has intentionally omitted.

It has always been a matter of historic integrity for this Court to decline to accept the petitioner's construction of a statute at issue which would be tantamount to the assumption of judicial legislation which this Court has scrupulously and vigorously avoided. Appropriately, it was held in *Hobbs* v. *McLean,* 117 U.S. 567, 579, 6 S. Ct. 870, 29 L. Ed. 940 (1886):

> "When a provision is left out of a statute, either by design or mistake of the legislature, the Courts have no power to supply it. To do so would be to legislate and not to construe."

Accord, Pirie v. *Chicago Title & T. Co.,* 182 U.S. 438, 21 S. Ct. 906, 45 L. Ed. 1171 (1900).

It is respectfully submitted that the very Petition for Writ of Certiorari filed herein has acknowledged that the Federal Metal and Non-Metallic Mine Safety Act, *supra,* does not provide for a private cause of action; the request that the Court create such a remedy should be therefore denied.

POINT IV

Dismissal of the Petition for Writ of Certiorari will not leave the petitioner without a remedy.

In seeking review, the petitioner has contended that the failure of the United States Court of Appeals for the Second Circuit to pass upon certain issues arising under the Federal Metal and Non-Metallic Mine Safety Act, *supra* has had the effect of leaving the petitioner bereft of remedy. However, the petitioner has commenced a companion action in the Supreme Court of the State of New York, County of Bronx, wherein the occurrence of September 13, 1971 is the subject of suit and in which negligence is asserted against the respondent Mathews & Chase as well as other party defendants. Although the City of New York was not named a defendant in that lawsuit, any of the defendants may, pursuant to applicable New York indemnity law, implead the City of New York as third-party defendant.

If, in fact, the petitioner has been caused a personal injury by reason of negligence of any of the defendants in the State Court action, then petitioner has a viable cause of action at common law, which is being vigorously prosecuted.

Under these circumstances, there would appear to be no valid reason, legal or equitable, for this Court to permit the petitioner the use of the Federal Courts as a means by which to seek a separate adjudication against the respondents herein, through strained interpretations of Federal Laws never intended to be applied to situations such as are here at issue.

CONCLUSION

It is respectfully submitted, that for all of the above reasons, the petitioner has failed to sustain the heavy burden required to invoke the Court's jurisdiction pursuant to Supreme Court Rule 19, and the Petition for a Writ of Certiorari should therefore be denied in all respects.

Respectfully submitted,

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